Supreme Court, U.S.
FILED
FEB 3 1993
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No. 92-889

# In the Supreme Court of the United States

OCTOBER TERM, 1992

CHAUFFEURS, TEAMSTERS, AND HELPERS, LOCAL 776, ETC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board correctly determined that petitioner, a labor organization, committed an unfair labor practice by continuing to prosecute a district court action seeking enforcement of an arbitral award, after an intervening decision of the Board made clear that the objective of petitioner's district court action was illegal.

2. Whether the Board abused its discretion by ordering petitioner to reimburse the employer for reasonable legal fees and expenses incurred in defending against petitioner's action.

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 973 F.2d 230. The decision and order of the National Labor Relations Board (Pet. App. A14-A28) is reported at 305 N.L.R.B. No. 114.

### JURISDICTION

The judgment of the court of appeals was entered on August 26, 1992. The petition for a writ of certiorari was filed on November 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Rite Aid Corporation (Company) operated a Central Distribution Center (CDC) in Shiremanstown, Pennsylvania. Pet. App. A16. Before August 1987, the CDC handled the sorting, storing, and shipping of unsold goods and the processing of returned goods from the Company's retail stores in the CDC's region. *Id.* at A3. Historically, the CDC employees were represented by petitioner, Chauffeurs, Teamsters and Helpers Local 776. *Ibid.* The labor agreement between petitioner and the Company contained a provision recognizing petitioner as the exclusive bargaining representative for a unit consisting of "all warehouse employees * * * employed by [the Company] at its Shiremanstown, Pennsylvania, operation; but excluding * * * all employees at the [Company's] other warehouse locations." *Id.* at A16. The agreement also provided for final and binding arbitration of grievances. *Id.* at A3, A16.

In August 1987, as a result of increased business, the Company opened a Central Returns Warehouse (CRW) in Shiremanstown to process returned goods, a function previously performed by the CDC. Pet. App. A3. The Company hired 27 new employees, who were not represented by a union, to staff the CRW, and assigned CDC employees who previously had handled returned goods work to different duties within the CDC. *Id.* at A3-A4.

Petitioner protested the Company's decision to staff the CRW with non-union employees. It filed grievances claiming that, since the returned goods work performed at the CRW was bargaining unit work covered by the labor agreement in effect at the

CDC, the terms of that agreement (including the union recognition clause) applied to the new CRW employees. Pet. App. A4, A17. In July 1988, an arbitrator ruled in petitioner's favor, finding that "the Company violated [the union recognition clause of the collective-bargaining agreement] by its failure to have applied the terms of the Agreement to the performance of returns work * * * by its [CRW] component." *Id.* at A17. The arbitrator's award required the Company to apply the terms of the CDC agreement to the CRW workers, and to make them whole regarding lost wages and benefits. The award also directed the Company to make petitioner whole for lost dues and initiation fees respecting the CRW employees. *Id.* at A4.

2. In August 1988, the Company filed a unit-clarification petition with the National Labor Relations Board (Board) seeking a ruling excluding the new CRW employees from the CDC bargaining unit. Pet. App. A4; see 29 U.S.C. 159(c). While the Company's petition was pending before the Board, petitioner moved for judicial enforcement of the arbitration award by filing an action against the Company in federal district court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185.[1] On

[1] Section 301(a) provides, in relevant part: "Suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. 185(a). Section 301 is a proper vehicle for obtaining judicial enforcement of an arbitration award. See, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

February 7, 1989, after a hearing, the Board's Regional Director issued a decision in the unit-clarification proceeding, excluding the CRW employees from the CDC bargaining unit because the evidence showed that the two facilities were essentially different operations and that the CRW was not an accretion to the CDC. Pet. App. A4.[2] The Regional Director recognized that the unit-clarification proceeding raised "the same fundamental issue that was the subject of the [arbitrator's] decision," but he declined to defer to the arbitral award because the core dispute went to "the representational status of the employees subject to the [unit-clarification] petition." *Id.* at A17. Petitioner thereafter sought review by the Board of the Regional Director's decision, but the Board denied the request as it raised no substantial issue. *Id.* at A5.

Despite the Regional Director's decision excluding the new CRW employees from the CDC bargaining unit, petitioner continued to press for judicial enforcement of the arbitrator's award. Pet. App. A17. In response, the Company filed an unfair labor practice charge against petitioner, alleging that petitioner's continued prosecution of its Section 301 action, in the face of the contrary unit-clarification decision, violated Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158

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[2] The Regional Director noted the Board's reluctance to add unrepresented employees to existing bargaining units, since accretion would in effect deny them an opportunity to express their preference respecting representation in a secret-ballot election. Pet. App. A4.

(b)(1)(A), 158(b)(2), 158(b)(3).[3] Pet. App. A5. In June 1989, the Board's General Counsel issued a complaint against petitioner and subsequently moved for summary judgment. *Id.* at A14.

Meanwhile, in September 1989, the district court issued a decision denying enforcement of the arbitrator's award and dismissing petitioner's Section 301 suit. The district court held that, since the question whether the new CRW employees fell within the CDC bargaining unit was representational rather than contractual, the arbitrator had exceeded his authority to interpret the collective bargaining agreement in fashioning his award. Pet. App. A4-A5. The Third Circuit affirmed the district court, and this Court denied review. *Teamsters Local Union No. 776* v. *Rite Aid Corp.*, 135 L.R.R.M. (BNA) 2061

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[3] Section 8(b)(1)(A) makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157. Section 7 provides, in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities." Section 8(b)(2) makes it an unfair labor practice for a union to "cause or attempt to cause" an employer to violate Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). Section 8(a)(3) prohibits an employer from engaging in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(b)(3) makes it an unfair labor practice for a union to "refuse to bargain collectively" with the employer.

(M.D. Pa. 1989), aff'd mem., 902 F.2d 1562 (3d Cir.), cert. denied, 111 S. Ct. 249 (1990).

3. In December 1991, the Board granted the General Counsel's motion for summary judgment. First, the Board agreed that the underlying dispute between petitioner and the Company was representational rather than contractual, and that the Regional Director, in his unit-clarification determination, had therefore acted properly in refusing to defer to the arbitral award. The Board noted that under *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), the arbitrator's decision was "superseded by the superior authority of the Board's subsequent unit clarification [order]."[4] Pet. App. A20.

Next, the Board found that petitioner violated Sections (8)(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act by continuing to prosecute its Section 301 suit from and after February 7, 1989, the date on which the Regional Director issued his decision superseding that of the arbitrator.[5] Pet. App. A20-A23. The Board

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[4] In *Carey*, the Court held that, although representational issues, such as whether "the employees involved in the controversy are members of one bargaining unit or another," may be submitted to arbitration, "[t]he superior authority of the Board may be invoked at any time," and, should the Board disagree with the arbitrator, "the Board's ruling would, of course, take precedence." 375 U.S. at 272.

[5] The Board relied on *Chicago Truck Drivers Union (Signal Delivery)*, 279 N.L.R.B. 904 (1986); *Local Union No. 323, IBEW (Active Enterprises)*, 242 N.L.R.B. 305 (1979); *Retail Clerks Local 588 (Raley's)*, 224 N.L.R.B. 1638 (1976), enforcement denied, 565 F.2d 769 (D.C. Cir. 1977); and *Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969). Pet. App. A20 n.5.

determined that petitioner's continued effort to obtain judicial enforcement of the arbitrator's award was a violation of Section 8(b)(3), because petitioner, in effect, was unlawfully insisting on bargaining for a change in the scope of the existing bargaining unit. Pet. App. A20. The Board also determined that petitioner violated Section 8(b)(1)(A), because, by insisting on application of the CDC labor agreement (including union-security provisions) to the CRW employees, petitioner unlawfully restrained and coerced the CRW employees respecting their right under Section 7 of the Act to representation by a union of their own choosing. Pet. App. A20-A21. And, since petitioner's continued insistence on application of the CDC agreement's union-security provisions was an attempt by petitioner to cause the Company to violate Section 8(a)(3)'s prohibition against "encourag[ing] * * * membership in any labor organization" that does not represent the CRW employees, the Board concluded that petitioner's conduct also ran afoul of Section 8(b)(2). Pet. App. A21.

Finally, the Board rejected petitioner's contention that *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), precluded the Board from condemning as an unfair labor practice petitioner's continued prosecution of its Section 301 suit. The Board noted that under *Bill Johnson's*, 461 U.S. at 749, it can enjoin as an unfair labor practice a lawsuit that was "filed with a retaliatory motive" only if the lawsuit has "no reasonable basis." Pet. App. A21. In this case, however, the Board ruled that it was unnecessary to determine whether petitioner's suit had a

retaliatory motive or lacked a reasonable basis, because petitioner's suit had an "illegal objective" and was therefore outside the protection of the *Bill Johnson's* rule.[6] *Id.* at A22 & n.8. The Board found that petitioner's Section 301 suit had an illegal objective, from and after the date of the Regional Director's decision in the unit-clarification proceeding (February 7, 1989), because it was "aimed at achieving a result that is incompatible with the Board's ruling" on the scope of the bargaining unit. Pet. App. A22. Accordingly, the Board ordered petitioner to cease and desist from maintaining its Section 301 action, and to reimburse the Company for reasonable legal fees and expenses incurred in defending against it after February 7, 1989.[7] Pet. App. A24-A25.

4. The court of appeals enforced the Board's order. Citing this Court's decision in *Carey* v. *Westing-*

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[6] In *Bill Johnson's*, the Court stated that its rule regarding Board cease and desist orders against lawsuits applied when the lawsuit was one that "federal law would not bar except for its allegedly retaliatory motivation." 461 U.S. at 737 n.5. The Court emphasized that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, *or a suit that has an objective that is illegal under federal law.*" *Ibid.* (emphasis added). As to the latter species of suit, the Court noted that its prior cases established that the Board may enjoin court actions seeking illegal objectives, such as the "enforcement of fines that could not lawfully be imposed under the Act." *Ibid.*

[7] As the Board noted, the district court judgment against petitioner had been affirmed by the Third Circuit, and rehearing and certiorari petitions had been denied. Pet. App. A14 n.2, A18. Thus, petitioner's lawsuit was completed before the Board entered its cease and desist order.

*house Electric Corp., supra*, as well as its own precedents, the court of appeals affirmed the primacy of Board rulings respecting representational issues, and, accordingly, found that "it should have been obvious to [petitioner] from and after February 7, 1989 * * * that the arbitration award was ineffective and that [petitioner] could not hope to have it enforced in its [Section 301] action." Pet. App. A7-A8. Although the court believed that, on the facts presented, the Board's finding that petitioner committed unfair labor pract-ices by continuing to prosecute its suit "appears somewhat strained," *id.* at A8, the court upheld the Board's finding as justified "in a technical sense," inferentially supported by precedent, and, therefore, deserving of judicial deference. *Id.* at A9.

The court of appeals also agreed with the Board that petitioner's Section 301 action fell within the "illegal objective" exception to *Bill Johnson's*. Pet. App. A12. The court stated that petitioner had prosecuted its Section 301 action "to circumvent the primary jurisdiction of the Board in deciding representational issues," and, therefore, the objective of the lawsuit was illegal. Pet. App. A12. The court explained that, in light of the Board's ruling in the unit-clarification proceeding, petitioner "simply could not obtain the relief it sought" on its Section 301 claim, "regardless of the evidence it produced." Pet. App. A12.[8]

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[8] The court of appeals also noted that, although the Board's order was framed as a cease and desist order, "in reality it had no such consequence," as the appellate proceedings involving the district court action had concluded before the Board acted. Pet. App. A12 n.4.

Finally, the court of appeals affirmed the Board's remedial order, including its requirement that petitioner reimburse the Company for legal fees and expenses incurred in defending against the Section 301 action. Pet. App. A13 n.5. The court held that the Board acted within its discretion in fashioning its order, and that petitioner's challenge to it was "clearly without merit." *Ibid.*

**ARGUMENT**

1. Petitioner contends (Pet. 5-7) that the court of appeals erred in finding that its lawsuit had "an objective that is illegal under federal law" and that it was therefore unprotected against a Board order under *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 737 n.5 (1983). That contention lacks merit and does not warrant this Court's review.

Petitioner does not dispute that, under *Bill Johnson's*, the Board may enjoin as an unfair labor practice a suit that has an illegal objective under federal law and that, in light of the Board's final determination on unit clarification, petitioner's continued prosecution of its arbitration enforcement action sought an illegal objective. Petitioner contends (Pet. 6), however, that it "could not have possibly" had such an illegal objective as of the date of the Regional Director's February 7, 1989, decision and order on unit clarification, because review proceedings before the Board were not final for another four months.[9]

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[9] After the Regional Director's decision, petitioner filed a request for review, which the Board denied as raising no substantial issue. Petitioner next filed a motion for reconsider-

The Regional Director's decision, however, was binding on petitioner. The Board's rules provide that, in a unit-clarification proceeding, "[t]he decision of the regional director shall be final." 29 C.F.R. 102.67(b). Although a party can request review by the Board, "[t]he filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of * * * any action taken or directed by the regional director." *Ibid.* Moreover, the Board will exercise its discretion to review a unit-clarification determination "only where compelling reasons exist therefor." 29 C.F.R. 102.67(c).[10]

Petitioner's determination to flout the Regional Director's decision, while seeking to invoke the Board's discretionary power to review that decision, is not a basis for immunizing it from liability for an unfair labor practice in this case. Nor is there any substance to petitioner's claim (Pet. 6) that the Board's decision not to seek an interim injunction under Section 10(j) of the Act, 29 U.S.C. 160(j), to halt

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ation, which the Board denied as untimely filed. Petitioner then sought leave to file its motion for reconsideration out of time, but the Board denied that request as well. Pet. App. A5.

[10] The limited nature of Board review is underscored by the provision that review "may be granted only" where (1) a substantial legal or policy issue is raised that is not governed by, or conflicts with, a Board precedent; (2) there was a clear error in the resolution of a substantial fact question, causing prejudice to a party; (3) there was a prejudicial ruling made during the hearing; or (4) "there are compelling reasons for reconsideration of an important Board rule or policy." 29 C.F.R. 102.67(c)(1)-(4). Under that provision, Board review of a unit-clarification determination is the exception rather than the rule.

the Section 301 suit somehow freed it to ignore the Regional Director's order. "[I]n virtually every case of alleged unfair labor practices, the [r]espondent acts at its peril." *Retail Clerks Local 588 (Raley's)*, 224 N.L.R.B. 1638, 1640 (1976), enforcement denied, 565 F.2d 769 (D.C. Cir. 1977).[11] That principle applies when a Regional Director has ruled, and review is then sought before the Board.[12] Petitioner, therefore, was properly held liable for unfair labor practices from the date that the Regional Director issued his order clarifying the scope of the unit.

There is no merit to petitioner's suggestion (Pet. 6) that it could not have been pursuing an illegal objective by litigating its Section 301 suit until December 11, 1991, because not until that date did the Board require petitioner to cease and desist from further prosecuting that suit. It is not the Board's cease and desist order that made petitioner's action unlawful; the relevant Board decision is the one that

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[11] In *Retail Clerks Local 588* v. *NLRB*, 565 F.2d 769 (D.C. Cir. 1977), the court of appeals denied enforcement of a Board order where the union had invoked arbitration in reliance on changed circumstances since the Board's unit-clarification decision. The court emphasized, however, that it would have been a far different case if the union had invoked "judicial process to enforce an arbitration award that conflicted with, or was mooted by, the Board's subsequent negative resolution of the accretion question." *Id.* at 776. That latter course of conduct describes petitioner's action here.

[12] See *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 N.L.R.B. 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975); *Laney & Duke Storage Warehouse Co.*, 151 N.L.R.B. 248, 266-267 (1965), enforced in relevant part, 369 F.2d 859, 869 (5th Cir. 1966).

petitioner sought to evade through the prosecution of its suit. See *Teamsters Local 952 (Pepsi-Cola Bottling)*, 305 N.L.R.B. No. 28 (Sept. 30, 1991); *International Longshoremen's & Warehousemen's Union, Local 13*, 290 N.L.R.B. 616 (1988), enforced, 884 F.2d 1407, 1413-1414 (D.C. Cir. 1989). In this case, that decision was the Regional Director's February 7, 1989, determination on unit clarification. Petitioner's goal in continuing to prosecute its Section 301 suit was to circumvent that ruling. Accordingly, petitioner's litigation objective in the Section 301 action was illegal beginning on that date.

Petitioner's reliance (Pet. 7) on the court of appeals' statement that the Board's finding of unfair labor practices "appears somewhat strained," Pet. App. A8, is misplaced. The court of appeals' comment was not addressed to the *Bill Johnson's* issue, but only to the question whether, on the facts in this case, the continued prosecution of the Section 301 suit could be deemed to coerce, or discriminate against, the employees involved. Not only did the court ultimately defer to the Board's resolution of that issue, but the issue raises at most a fact-bound evidentiary matter that does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner also contends (Pet. 7-8) that the Board abused its discretion by ordering it to reimburse the Company for legal fees and expenses incurred in defending against petitioner's Section 301 action after February 7, 1989. That claim does not merit review.

First, petitioner is jurisdictionally barred from asserting that claim. Although petitioner raised it in the court of appeals, petitioner never raised it before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has shown no "extraordinary circumstances" excusing its failure to make this argument to the Board. Petitioner could have raised it either in its response to the General Counsel's motion for summary judgment, or in a motion for reconsideration once the Board issued its order. Since petitioner did neither, the courts lack jurisdiction to consider petitioner's claim. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, petitioner's contention is incorrect. When the Board finds that a party has committed an unfair labor practice by filing a lawsuit, the Board may, pursuant to Section 10(c) of the Act, 29 U.S.C. 160(c), compel that party to reimburse those wrongfully sued for their reasonable attorney's fees and expenses incurred in defending against the unlawful suit. *Bill Johnson's*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses."). Here, the Board acted consistently with *Bill Johnson's* in awarding the Company reasonable legal

fees and expenses because petitioner had wrongfully sued it in federal court.

The authorities cited by petitioner (Pet. 8) address a separate issue: whether the Board should award litigation costs incurred in the unfair labor practice proceeding itself. Those authorities indicate that, if the Board had found that petitioner's basis for resisting the General Counsel's motion for summary judgment was frivolous, the Board could have awarded fees to the Company. As no such finding was made in this case, the Board did not shift those costs to petitioner. Petitioner's authorities, however, are irrelevant on the question whether the Board may award litigation expenses because of a wrongful suit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993